COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP3079-CR | **Cir. Ct. No. 2003CF880**

STATE OF WISCONSIN | **IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD W. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Nettesheim, and Snyder, JJ.

¶1 PER CURIAM. Todd Schultz appeals from a judgment of conviction of party to the crime robbery with threat of force while concealing identity and burglary while armed with a dangerous weapon. He also appeals from an order denying his postconviction motion for a new trial based on alleged

ineffective assistance of trial counsel. He argues that after a key witness invoked his Fifth Amendment privilege during cross-examination, the witness's direct examination should have been struck and that impermissible hearsay was admitted into evidence. We conclude that trial counsel was constitutionally deficient when he failed to move to strike the witness's testimony after the witness invoked his Fifth Amendment privilege. We reverse the judgment and order and remand for a new trial.

¶2 Michael Placek agreed to purchase a computer for $2,000 via Ebay from a seller known as Joe Dembowski. Placek arranged to make the exchange at a house in Racine County. When Placek arrived at the house, he was drawn into the garage where two men robbed him of $2,000 at gunpoint. One man was armed and masked; the other was unmasked and unarmed. The unmasked robber kept his back to Placek the whole time.

¶3 Reza Dembowski was arrested as the unmasked robber. He indicated that Schultz was the masked and armed robber. With complete immunity for the crimes, Dembowski testified that he and Schultz had planned to obtain money by selling a nonexistent computer on Ebay. He indicated it was Schultz's idea to take the money by force when it turned out the buyer wanted to pick up the computer in person. Dembowski arranged for Placek to pick the nonexistent computer up at a home Schultz was watching for a friend who had moved out of town. Dembowski said Schultz brought a shotgun in a hard black case to the robbery. On cross-examination, he said Schultz had provided him with a stolen credit card to set up the Ebay account. He described the scheme as "a mutual thing" and that Schultz "was advising me on different things."

¶4 Schultz wanted to question Dembowski about a complaint to police that Dembowski had sold over the internet a stolen computer with missing parts. That incident occurred shortly before the crime against Placek. The circuit court raised concerns about Dembowski's Fifth Amendment privilege against self-incrimination since the grant of immunity did not necessarily cover the earlier police complaint. The prosecution refused to grant immunity as to the four-year-old complaint. Ultimately Dembowski indicated he would assert his Fifth Amendment privilege to any questions about the police complaint and Schultz was barred from exploring it further. There was no motion to strike Dembowski's direct examination.

¶5 Schultz filed a motion for a new trial alleging ineffective assistance of trial counsel in failing to move to strike Dembowski's testimony. Trial counsel testified that he was surprised he had not moved to strike the testimony after Dembowski invoked his Fifth Amendment privilege and that he had no strategic reason for not doing so. The circuit court concluded that had the motion to strike been made during trial, the motion would not have been granted because there was ample evidence of other schemes Dembowski had been involved with. It determined that Schultz was not prejudiced by trial counsel's failure to move to strike the testimony because there was ample evidence for the jury to doubt and weigh Dembowski's credibility and the victim's testimony and other physical evidence demonstrated that the real controversy was fully tried.

¶6 Schultz first argues that the circuit court had a *sua sponte* duty to consider whether his due process rights to confrontation were violated when Dembowski invoked his Fifth Amendment privilege and to then strike the testimony. He contends the circuit court should have explored the prosecution's refusal to grant immunity and conditioned the prosecution's use of Dembowski's

direct examination on a further grant of immunity so Schultz could have meaningful cross-examination. Although the circuit court stepped in to protect the witness's Fifth Amendment privilege, we are not persuaded that there was a corresponding duty to strike testimony in the absence of an objection or motion to strike. Schultz waived his claim that the circuit court erred in not striking the testimony. *See* ***State v. Gove***, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989) ("even the claim of a constitutional right will be deemed waived unless timely raised in the trial court").

¶7 We confine our consideration of the issue to an ineffective assistance of trial counsel analysis. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (in the absence of an objection we address waiver within the rubric of the ineffective assistance of counsel).

> To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight . . . and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694).

> Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate determination of whether the attorney's performance falls below the constitutional minimum, however, is a question of law subject to our independent review. ***Id.***

State v. Cooks, 2006 WI App 262, ¶¶33-34, 297 Wis. 2d 633, 726 N.W.2d 322.

¶8 The circuit court determined that because it would not have granted the motion to strike Dembowski's testimony, trial counsel was not deficient for not moving to strike it. However, the State does not address the performance prong of the ineffectiveness analysis separately and merges the merits of the motion to strike with the discussion of the prejudice prong. The success or failure of the missing motion is a consideration in determining the prejudice prong. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

¶9 The State acknowledges that when cross-examination is restricted by a witness's invocation of the Fifth Amendment, "courts must watch vigilantly to ensure . . . the right of cross-examination itself" and that "it may be necessary in some cases to prohibit that witness from testifying or to strike portions of the testimony." ***State v. Barreau***, 2002 WI App 198, ¶52, 257 Wis. 2d 203, 651 N.W.2d 12. It is not disputed that a motion to strike Dembowski's testimony would have had arguable merit and was necessary to compel inquiry into the right of effective cross-examination. Counsel had no strategy reason for not making the motion. We conclude that trial counsel's failure to make the motion was deficient performance.

¶10 As to prejudice we observe that the credibility of Dembowski was the critical issue at trial. The victim could not identify Schultz as the masked robber. Schultz testified maintaining his innocence. He explained why a gun case was removed from his house in the days before the robbery and why it reappeared later. There was also testimony from a person who had shared a jail cell with Dembowski that Dembowski had said a friend from high school had committed the crime with him. Schultz is older than Dembowski and did not attend high school with him. The trial centered on Dembowski's credibility versus Schultz's credibility.

¶11 We recognize that there was other evidence impeaching Dembowski's credibility since he admitted he was part of a group that created phony credit cards and credit accounts and used them to buy merchandise. One of his roles in that scheme was to recruit retail store employees, people he knew from high school, to help from the inside. He also admitted that he had applied for a social security card under a false name. We reject the State's attempt to downplay the significance of Dembowski's prior internet fraud involving the sale of a computer because it did not actually involve a physical robbery. Dembowski testified that Schultz had played a leading role in both setting up the internet sale and the physical robbery. That Dembowski was involved in a prior fraudulent internet computer sale bore directly on testimony incriminating Schultz.

¶12 In ***Thiel***, 264 Wis. 2d 571, ¶79, the court expressed concern "about underestimating the importance of cumulative credibility evidence in a case that depends so heavily on the credibility of the complainant." This case, like ***Thiel***, rests heavily on the credibility of one witness. We cannot merely conclude that additional evidence further undermining that witness's credibility, particularly on conduct similar to the crimes, can be devalued as merely cumulative. In short, our

confidence in the outcome is undermined by trial counsel's failure to move to strike Dembowski's testimony so that Schultz's right to meaningful cross-examination could be considered and protected. We reverse the judgment and order and remand for a new trial.

¶13 Schultz raises as an additional issue that improper hearsay was admitted. Rick Mascarette, Schultz's friend who owned the house where the robbery took place, testified that when he moved out of town he stored his shotgun at Schultz's house. There was other evidence that Mascarette's gun case was missing from Schultz's house before and for a couple days after the robbery. Mascarette testified that Schultz said he had taken the gun to the home of Mascarette's father to repair it. Mascarette's father was deceased at the time of trial. When Mascarette was asked if he was able to verify Schultz's story about getting the gun repaired, Schultz made a hearsay objection. The circuit court allowed Mascarette to answer the question. The prosecutor rephrased the question as to whether Mascarette was "able to verify whether or not that information given to you by the defendant was true and correct." Mascarette indicated that he had verified that the story was not true.

¶14 Because a new trial is ordered, we need not address the claim of possible evidentiary error at the first trial. However, it does appear to skirt the prohibition against hearsay to ask whether certain information is "verified" when verification must be based on the statements of a third person. To make matters worse, Mascarette was asked to verify the truthfulness of an out-of-court statement. On retrial every effort should be made to not offer such testimony which may constitute a hearsay violation.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.